

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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HALIMA TARIFFA CULLEY, ET AL.,)
 Petitioners,)
 v.) No. 22-585
STEVEN T. MARSHALL, ATTORNEY)
GENERAL OF ALABAMA, ET AL.,)
 Respondents.)
- - - - -

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Place: Washington, D.C.
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10
11 Washington, D.C.
12 Monday, October 30, 2023
13

14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:05 a.m.
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3 of the Petitioners.
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6 NICOLE F. REAVES, Assistant to the Solicitor General,
7 Department of Justice, Washington, D.C.; for the
8 United States, as amicus curiae, supporting the
9 Respondents.
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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 22-585, Culley
5 versus Marshall.

6 Mr. Dvoretzky.

7 ORAL ARGUMENT OF SHAY DVORETZKY

8 ON BEHALF OF THE PETITIONERS

9 MR. DVORETZKY: Mr. Chief Justice, and
10 may it please the Court:

11 The question presented is narrow:
12 Should courts apply Mathews or Barker to assess
13 the sufficiency of process in civil forfeiture
14 proceedings? The answer is Mathews.

15 Mathews is the default due process
16 standard for civil cases and for good reason.
17 It assesses both the private and governmental
18 interests to guard against unreasonable risks of
19 error. And the Court has consistently applied
20 it to determine whether more process is due,
21 including in Good, another civil forfeiture
22 case.

23 Respondents prefer Barker because
24 Barker's answer is always no additional process.
25 But Respondents' primary argument is just that

1 \$8,850 and Von Neumann already decided the
2 question, not that Barker makes sense and
3 Mathews doesn't.

4 Respondents are wrong. As the Second
5 and Sixth Circuits have explained in adopting
6 Mathews over Barker, \$8,850 and Von Neumann
7 concern the length of time for a final
8 disposition rather than the need for an interim
9 hearing. The litigants in \$8,850 and Von
10 Neumann also were not claiming innocence, so
11 they were not seeking and the Court did not
12 address retention hearings.

13 Only Mathews can answer the
14 sufficiency of process question. The courts of
15 appeals and state supreme courts that have
16 addressed the question presented have
17 overwhelmingly chosen Mathews over Barker.
18 Although the Court need not go beyond the
19 methodological question presented and apply the
20 Mathews factors, the point of Mathews is to --
21 is to ensure that laws adequately protect the
22 Constitution's fundamental due process
23 guarantee, taking into account the private and
24 governmental interests at stake. It's not to
25 micromanage state legislatures.

1 The easiest way for a jurisdiction to
2 ensure its laws comport with due process, as the
3 Second and Sixth Circuits have explained, is
4 generally to offer a reasonably prompt
5 post-seizure hearing to allow claimants to raise
6 an innocent owner argument. Indeed, numerous
7 states have done just that, and their experience
8 makes clear, contrary to Respondents'
9 contentions, that retention hearings are
10 workable and effective.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Before we get to the
13 choice between Barker and Mathews, isn't there
14 the -- an antecedent question as to whether or
15 not there's any constitutional requirement for
16 additional hearings in the context of
17 forfeiture?

18 MR. DVORETZKY: Justice Thomas, I
19 think that that question is what Barker or
20 Mathews, depending on which test this Court
21 would choose as the answer --

22 JUSTICE THOMAS: Well, the reason I
23 ask that is because you seem to assume that a --
24 an additional hearing is required.

25 MR. DVORETZKY: We're not assuming

1 that an additional hearing is required. We're
 2 saying that Mathews is the way to analyze
 3 whether an additional hearing is required.
 4 Mathews is the test that the Court has applied
 5 in cases like Good, where a litigant comes
 6 forward and says the process being provided in
 7 this case, as in Good, no hearing, is
 8 insufficient. And the way to think of that
 9 under Mathews is to say, well, what are the
 10 private interests in a hearing, what are the
 11 governmental interests on the other side, and
 12 what would be the value of additional process?

13 JUSTICE THOMAS: Well, let me ask you
 14 this. In your case, if you had filed a motion
 15 for summary judgment a week after the property
 16 had been taken or the process had begun,
 17 forfeiture proceedings began, would -- would you
 18 be here?

19 MR. DVORETZKY: I think -- I think we
 20 would be here.

21 JUSTICE THOMAS: Why? You would have
 22 your property back because you -- you won on
 23 summary judgment, right?

24 MR. DVORETZKY: We -- we won on
 25 summary judgment after going through discovery

1 with the state, which, by the way, the state
2 took five months to respond to our discovery
3 requests.

4 Summary judgment, we -- we would have
5 won, but due process is an affirmative guarantee
6 that requires more than the possibility that a
7 judge would expedite summary judgment. There's
8 no --

9 JUSTICE THOMAS: But what would be
10 your -- if you got your property back, what
11 would be the constitutional problem? What would
12 be the due process problem?

13 MR. DVORETZKY: If we had promptly
14 gotten our property back in a -- measured by
15 days or weeks rather than months or years, then,
16 in that situation, I think we probably would not
17 have a constitutional claim.

18 JUSTICE THOMAS: So --

19 MR. DVORETZKY: But the due --

20 JUSTICE THOMAS: -- here's my problem:
21 You say that you could have -- under Alabama's
22 proceed -- procedures, you could have gotten
23 your property back in a reasonable time.

24 MR. DVORETZKY: I -- I -- I dis- --

25 JUSTICE THOMAS: You could have.

1 MR. DVORETZKY: Hypothetically, we
2 could have, just as somebody could come to this
3 Court and -- and ask it for extraordinary relief
4 that the Court is under no obligation to
5 provide.

6 Due process doesn't depend on whether
7 a court is going to exercise its discretion to
8 expedite a case. Realistically, courts rarely
9 do that. And, moreover, the summary judgment
10 standard, that's about proving your ultimate
11 entitlement on the merits definitively.

12 CHIEF JUSTICE ROBERTS: Well, you say
13 courts rarely do that. Do we have any evidence
14 about how long or how often courts in Alabama
15 grant motions to expedite in this context?

16 MR. DVORETZKY: So, Mr. Chief Justice,
17 there -- there is not a record on that. I
18 think, as -- as a practical matter, not in the
19 record, it's not very common, but in terms of
20 applying the Mathews factors, that is something
21 that could be considered and that could be
22 developed on remand in assessing what is the
23 value of additional procedures.

24 Again, the methodological question
25 here in determining whether an additional

1 hearing is required is just, how do we think
2 about that? Do we think about that by applying
3 the Mathews factors, which is the -- that -- the
4 traditional test for determining whether
5 additional process is due in the civil context,
6 or do we --

7 JUSTICE SOTOMAYOR: Can we go back to
8 your answer to Justice Thomas? The purpose of
9 summary judgment is to decide the ultimate
10 question, who owns the car, correct?

11 MR. DVORETZKY: Yes.

12 JUSTICE SOTOMAYOR: The purpose of a
13 -- a post-seizure hearing is to determine who
14 keeps custody of the car, correct?

15 MR. DVORETZKY: Yes.

16 JUSTICE SOTOMAYOR: And the focus is,
17 therefore, different? The focus in the post- --
18 in the -- in the hearing would be is -- there
19 might be a disputed issue of fact with respect
20 to ownership. The government might claim it
21 needs discovery. A government might claim it
22 has some facts that would lead to a judgment
23 that it needs to explore. But the court would
24 then weigh whether or not that is sufficient not
25 to give custody to the car owner pending the

1 hearing, correct?

2 MR. DVORETZKY: Yes, Justice
3 Sotomayor.

4 JUSTICE SOTOMAYOR: So summary
5 judgment doesn't answer this question or the
6 isolated question of who keeps custody of the
7 car pending the ultimate judgment, correct?

8 MR. DVORETZKY: That's right.

9 JUSTICE KAVANAUGH: You referred --

10 JUSTICE KAGAN: Well, may I ask about
11 that --

12 JUSTICE SOTOMAYOR: Now --

13 JUSTICE KAGAN: I'm sorry, please.

14 JUSTICE SOTOMAYOR: No, I was just
15 going to say, whether or not summary judgment is
16 adequate given that difference in the focus of
17 the hearings, I'm presuming that's why you're
18 saying that's not the issue before us. The
19 issue before us is, what of the two tests do we
20 apply to determine whether that's enough or not?

21 MR. DVORETZKY: That -- that --

22 JUSTICE SOTOMAYOR: Correct?

23 MR. DVORETZKY: That's right, Justice
24 Sotomayor.

25 JUSTICE KAGAN: I mean, if I could ask

1 about that same kind of thing, what the
2 difference is between the retention hearing and
3 the final forfeiture determination, I mean, take
4 a case like this, where your client is raising
5 an innocent owner defense, and I would think
6 that the questions about whether she was an
7 innocent owner are pretty much the same in the
8 retention hearing and in the final forfeiture
9 determination, isn't that correct?

10 MR. DVORETZKY: I think the
11 substantive question is -- is the same, yes.

12 JUSTICE KAGAN: Now there is a
13 different burden, but if she can prove at the
14 retention hearing under a probable cause
15 standard that she is entitled to the car back, I
16 mean, there's no way the government is going to
17 lose on the final determination, right? I mean,
18 she's proved that she's entitled to the car?

19 MR. DVORETZKY: I -- I think that's
20 most likely correct. In theory, by the time of
21 the final determination, there could be some
22 additional discovery or investigation that
23 happens that would change the calculus.

24 JUSTICE KAGAN: Yeah, I suppose --

25 MR. DVORETZKY: But most likely --

1 JUSTICE KAGAN: -- in an individual
2 case, but most likely --

3 MR. DVORETZKY: Most likely.

4 JUSTICE KAGAN: -- the government
5 probably would just give up at that point,
6 right, under this, you know, very generous
7 standard to the government they've lost, they're
8 not going to keep on pursuing the thing, so
9 she's gotten her car back and the case is over.

10 And I guess what this suggests is that
11 in both cases, you're really adjudicating the
12 same thing, which is like am I entitled to my
13 car back right now? So how is it really
14 different? I understand saying this is interim,
15 this is final, but in the end, it's just am I
16 entitled to my car back now.

17 MR. DVORETZKY: Justice Kagan, I think
18 that the substantive question is the same, but
19 there are a few key differences between the
20 retention hearing and the later merits
21 determination.

22 For one thing, I don't know that the
23 premise is correct that the government would
24 just give up if it loses at the retention
25 hearing. Again, there's a -- a different

1 procedural standard later. The government has
2 the opportunity to conduct more discovery. The
3 government also has, in -- in -- in Alabama, as
4 well as 25 other states, a financial incentive
5 to keep pursuing the forfeiture proceedings
6 because they get to keep the proceeds.

7 And so I don't know that it's
8 empirically correct that the government would
9 simply give up if it loses at the -- the
10 retention hearing. In addition to that --

11 JUSTICE KAGAN: I guess what I'm --
12 what I'm asking is, if -- if -- if we had a case
13 that says, you know, the constitutional rule
14 about forcing a determination about what --
15 about -- about who's entitled to the car is the
16 Barker rule, you know, why it is that we can
17 say: Well, we have that rule, but, in fact,
18 there's -- there's another constitutional rule
19 which is much more beneficial to the claimant
20 that's meant to address exactly the same
21 question that we held in \$8,850 was addressed by
22 Parker?

23 MR. DVORETZKY: So I think they're
24 different -- for one thing, I think they are
25 different questions, as the Second and the Sixth

1 Circuit have explained.

2 In Barker -- in Barker, the only
3 question -- it was essentially a case where
4 the -- the claimant was trying to argue a
5 gotcha. There was no argument in got -- in
6 Barker -- I'm sorry, in \$8,850 or Von Neumann
7 that the government was not ultimately entitled
8 to forfeit the property. There was no innocent
9 owner defense.

10 The claimant's argument there was,
11 well, but you waited too long in order to
12 actually complete the proceedings and,
13 therefore, I get my car back. And in that
14 situation, this -- this Court said the Barker
15 test applies.

16 There's a different argument where you
17 have an innocent owner defense, where you have
18 somebody coming forward and saying: I should be
19 entitled as a matter of Alabama state law, the
20 rights that Alabama state law gives to me, I
21 should be entitled to keep my car. And the
22 state can't effect a de facto forfeiture of that
23 car for months or years during the pendency of
24 proceedings.

25 JUSTICE KAVANAUGH: But, in both --

1 MR. DVORETZKY: That's a --

2 JUSTICE KAVANAUGH: -- cases, the
3 claimant wants the property back in the -- in
4 the interim. And the court, I mean, couldn't
5 have been much clearer in its language.

6 "The forfeiture proceeding without
7 more provides the -- the hearing required by due
8 process to protect Von Neumann's property
9 interest in the car," and then repeated it two
10 pages later, "the right to a forfeiture
11 hearing here -- proceeding meeting the Barker
12 test satisfies any due process right with
13 respect to the car and the money."

14 And those, to me, didn't seem to be
15 accidental comments. I went back to the oral
16 argument transcript where exactly this question
17 was posed about is that all the process that's
18 -- that's due, and the court was very
19 definitive.

20 So you've -- you've referred a few
21 times to a methodological question.
22 Methodologically, how can we get around from
23 your perspective that seemingly clear statement?
24 I know you have factual distinctions, but those
25 are broad, clear statements that have guided

1 courts since.

2 MR. DVORETZKY: Justice Kavanaugh, I
3 think those statements have broad language that
4 has to be understood in context. With respect
5 to the first sentence that you quoted, the
6 forfeiture proceeding without more provides the
7 post-seizure hearing that due process requires.
8 That was in part 2 of Von Neumann.

9 Part 2 of Von Neumann was the section
10 of that opinion holding that the claimant had no
11 due process interest in the first place. That
12 sentence can't reasonably be understood to say
13 anything about due process where, as here, the
14 substantive Alabama law confers an additional
15 interest that then gives rise to new due process
16 requirements.

17 With respect to the second sentence
18 that you quoted, first of all, that was just
19 referring back to the first sentence from part
20 2, which, again, doesn't apply here. In that
21 second -- in the third part of the Von Neumann
22 opinion where that sentence comes from, the
23 court assumed that a protected due process
24 interest existed.

25 That assumption doesn't really make a

1 lot of sense doctrinally. You can't have a due
2 process interest in a remission proceeding,
3 which is essentially like a discretionary
4 pardon.

5 And, in any event --

6 JUSTICE KAVANAUGH: That was the
7 argument, though, wasn't it?

8 MR. DVORETZKY: I'm sorry?

9 JUSTICE KAVANAUGH: That was the
10 argument, right?

11 MR. DVORETZKY: The -- the court
12 assumed there that there was a due process
13 interest. But I'm saying the -- the assumption
14 doesn't even really hold because you can't have
15 a due process interest in that kind of a
16 discretionary proceeding.

17 And beyond that, again, the -- the
18 argument that the Court actually addressed in
19 the Von Neumann opinion was about a final
20 determination. It was about the speed to final
21 determination in a context where there was no
22 substantive right to avoid the forfeiture.

23 JUSTICE BARRETT: So, Mr. Dvoretzky --

24 MR. DVORETZKY: That's --

25 JUSTICE BARRETT: -- just to be sure I

1 understand what your -- your answer is to
2 Justice Kavanaugh, is it that the due process
3 right to the hearing is tied to the innocent
4 owner defense, and if there were no innocent
5 owner defense, there wouldn't be a right to a
6 retention hearing?

7 MR. DVORETZKY: I think, if there were
8 no innocent owner defense -- first of all,
9 we're -- we're not asking the Court to go beyond
10 holding that there is a due process right in a
11 -- where there's an innocent owner defense.
12 And, in fact, we're not even asking the Court to
13 go that far because we're only asking for the
14 methodological holding about whether to apply --

15 JUSTICE BARRETT: Because the
16 methodological --

17 MR. DVORETZKY: -- Mathews or Barker.

18 JUSTICE BARRETT: I understand that,
19 but does the methodological question -- I mean,
20 because I -- I -- I think you have kind of a
21 hard road to hoe, as Justice Kavanaugh is
22 pointing out, when you look at the language in
23 Von Neumann and \$8,850, so my question is,
24 methodologically, does a court even -- in your
25 view, does a court even need to ask the question

1 whether a retention hearing is due if there's no
2 innocent owner defense?

3 MR. DVORETZKY: I -- I think it does
4 because, even in that context, I think there is
5 a difference between the claim about a final
6 determination and the speed of the final
7 determination in Von Neumann and \$8,850 versus
8 the interim deprivation that's at issue here.

9 But I think it's a lot clearer that
10 Von Neumann and \$8,850 don't speak to the
11 question presented when, as here, you have an
12 additional substantive right created by state
13 law that wasn't at issue in those earlier cases.

14 And as this Court's due process
15 jurisprudence makes clear, when states create
16 substantive rights, that can also give rise to
17 additional due process protections --

18 JUSTICE BARRETT: But does it even --

19 MR. DVORETZKY: -- that are required.

20 JUSTICE BARRETT: -- make sense to ask
21 this question? I mean, you -- you point out
22 that Gerstein, rather than Barker, is the more
23 apt analogy, but you don't get a hearing on the
24 probable cause determination.

25 So you're asking, you know, as the

1 state points out, for more process, more robust
2 process in this context of civil forfeiture than
3 a criminal defendant gets.

4 MR. DVORETZKY: A couple of points on
5 that, Justice Barrett.

6 First of all, the point of our
7 reliance on Gerstein is simply to show that even
8 in the criminal context, Barker is not the --
9 the overarching test that applies in all
10 circumstances.

11 So, even in the criminal context,
12 Barker doesn't speak to every constitutional
13 issue that could come up having to do even with
14 timing. And just so here, Von Neumann and
15 \$8,850 don't speak to any potential due process
16 claim that could be raised.

17 With respect to the argument that --
18 that under our view, the argument that the state
19 makes that property is somehow getting greater
20 protection than persons, there's a panoply of
21 protections under criminal law that defendants
22 get.

23 In this case and particularly where
24 you have an innocent owner defense, there has
25 not even been any sort of a probable cause

1 determination made by the police at the time of
2 the seizure about the innocent owner defense.

3 The police here are seizing the car
4 incident to arrest. They're not even making a
5 determination in their own minds at that point,
6 well, who owns the car and does that person have
7 a -- a probable claim of innocence?

8 JUSTICE ALITO: Do you think --

9 MR. DVORETZKY: And to all --

10 JUSTICE ALITO: -- that the -- the
11 innocent owner defense is required by the
12 Constitution?

13 MR. DVORETZKY: This Court has held
14 that it's not in Bennis versus Michigan, so no.

15 JUSTICE ALITO: All right. If the
16 state creates that, could it allocate the burden
17 of proof to the defendant -- to the owner of the
18 car?

19 MR. DVORETZKY: I -- I think it could,
20 and if you look at Alabama law, under the
21 pre-2022 version, the burden of proof was
22 allocated to the owner of the car, and under the
23 current version, the burden of proof is
24 allocated to the government.

25 JUSTICE ALITO: And could it say that

1 the owner of the car must prove innocence by
2 clear and convincing evidence?

3 MR. DVORETZKY: I think it could if
4 that were the -- I think it could.

5 JUSTICE ALITO: If -- the retention
6 hearing has to occur within 48 hours of the
7 seizure. You didn't -- in your argument this
8 morning, you didn't mention a time. You said
9 reasonably prompt.

10 How -- is it practical to expect the
11 police to be able to prove within a short period
12 of time that the owner of the car did not know
13 that the person driving the car was going to
14 have drugs in the car?

15 MR. DVORETZKY: So, Justice Alito,
16 first, I do think that reasonably prompt is the
17 standard. The way that the lower courts have
18 interpreted that is generally a few weeks.
19 We're not asking for the 48-hour standard under
20 Gerstein, although that is -- to Justice
21 Barrett's question, that is another example of
22 where we are not actually asking for more
23 protection for property than for people --

24 JUSTICE ALITO: What does --

25 MR. DVORETZKY: -- and the Gerstein --

1 JUSTICE ALITO: -- what does "a few
2 weeks" mean? I'm sorry to interrupt. What does
3 "a few weeks" mean?

4 MR. DVORETZKY: So the Sixth Circuit
5 in the Ingram case recently said two weeks. In
6 New York, for Krimstock hearings, they have to
7 happen within 10 business days, so that's two
8 weeks as well. I don't know that it is a rigid
9 line at two weeks. I don't think this Court
10 needs to decide a particular day at which it
11 needs to happen, but it needs to happen
12 reasonably promptly on a scale measured by weeks
13 rather than -- rather than months or years,
14 which is how civil litigation ordinarily
15 happens.

16 JUSTICE JACKSON: Are you asking us --

17 JUSTICE ALITO: What about --

18 JUSTICE JACKSON: -- to decide that in
19 this case, though? I mean, I guess I'm confused
20 because I thought we were doing just Barker
21 versus Mathews in terms of figuring out whether
22 or not there is a procedural due process claim
23 here. I didn't understand us to be answering
24 the question how many weeks are necessary, but
25 maybe I'm confused.

1 MR. DVORETZKY: No, you understood
2 correctly, Justice Jackson. The question
3 presented is simply about which methodology,
4 which test applies to determine whether a
5 hearing is due, not --

6 JUSTICE JACKSON: And whichever one we
7 decide, we could remand it for the lower court
8 to actually apply it in this case to determine
9 whether or not there was a procedural due
10 process violation, correct?

11 MR. DVORETZKY: Absolutely.

12 JUSTICE JACKSON: All right. So
13 getting back to Justice Kagan's question about
14 the Barker test, I just -- I'm -- I thought that
15 Barker was about timing and that there were, in
16 fact, various species of due process claims that
17 could be made, one of which is about how quickly
18 or slowly the government has acted to give the
19 procedure that it has said it's going to give
20 you. And that's one kind of thing.

21 And then, say, another is I'm
22 contesting the procedures that the government is
23 offering. I think more things need to be done
24 with respect to this particular set of
25 circumstances. That's another kind of claim.

1 And so I had understood that Barker
2 applies to the former when you're complaining
3 about timing, and I saw \$8,850 and Von Neumann
4 to be in that bucket. And Mathews v. Eldridge
5 traditionally applies in the other scenario,
6 which is what I thought the claimants were
7 making here today.

8 Am I looking at this in sort of too
9 simplistic a way or -- I guess I'm concerned
10 about the suggestion that Barker be applied in a
11 situation in which the claim is not about the
12 timing.

13 MR. DVORETZKY: I think you're looking
14 at it correctly, Justice Jackson. And maybe as
15 to the timing question in \$8,850, that tracks
16 the Barker test, but we're asserting a different
17 kind of claim here.

18 JUSTICE JACKSON: So why is it
19 different?

20 JUSTICE KAGAN: I definitely didn't
21 understand that.

22 JUSTICE JACKSON: Yes. Why is it
23 different?

24 JUSTICE KAGAN: The only reason you're
25 asking for a retention hearing is to get the car

1 back sooner. That's a question about timing.
2 They're both questions about timing. Barker set
3 one timing rule. The claimants here want
4 another timing rule, which is a more generous to
5 the claimant timing rule.

6 I mean, it's no -- it's not process
7 for process's sake. It's process because people
8 are without a car and they think that they're
9 entitled to the car and they want the car back
10 sooner. So that too is a timing rule, isn't it?

11 MR. DVORETZKY: You can look at it as
12 a timing question at a general level. That
13 still doesn't mean that these are the same
14 questions. Take the criminal context for -- as
15 -- as an analogy. You could say that the Barker
16 speedy trial right is all about getting to a
17 final determination quickly. You also have a
18 separate right under Gerstein to a probable
19 cause determination within 48 hours.

20 I suppose, in a hypothetical
21 situation, where we went from an indictment to a
22 trial and a verdict within 48 hours, you would
23 say: Well, there's no need in that situation
24 for a Gerstein hearing because the superfast
25 trial in that situation mooted the separate

1 interest in the probable cause determination
2 under Gerstein. That doesn't mean that they
3 aren't separate interests.

4 So too here. There may -- there's one
5 interest in getting to a timely ultimate
6 determination. That's what was at issue in Von
7 Neumann and \$8,850 and for which the Court
8 analogized to Barker. There's a separate
9 interest in retaining your property during the
10 time that it takes to reach that final
11 determination.

12 And, again, hypothetically, if you had
13 a trial within 48 hours, you wouldn't even have
14 to worry about the interim determination.

15 JUSTICE GORSUCH: Counsel --

16 MR. DVORETZKY: But, in the real
17 world, you do.

18 JUSTICE GORSUCH: -- it seems very
19 strange that we're asking which of two
20 precedents apply rather than what the Due
21 Process Clause commands. I mean, it's just a
22 weird question presented as far as I'm
23 concerned. And I guess I'm -- my head's still
24 stuck back at -- at that and some of the
25 questions that you heard early on, which is

1 whatever test you apply, clearly, there are some
2 jurisdictions that are using civil forfeiture as
3 funding mechanisms and say: Ah, you can get
4 your car back if you call between 3 and 5 p.m.
5 on a Tuesday and -- and -- and speak with
6 someone who is never available, right? I mean,
7 there are -- that is happening out there.

8 But it didn't look to me -- I'll be
9 honest and put my cards on the table -- that
10 that was the case in Alabama. And -- and I
11 understand your client filed for summary
12 judgment 13 or 18 months later, whatever, but
13 what would have impaired them from -- from
14 filing a summary judgment motion on day one?
15 It's an innocent owner defense. They know the
16 facts of their ownership of their car and how it
17 was misused.

18 I'm not sure I understood the reason
19 for the delay and how it might be fairly
20 attributable to the state. So, while I'm very
21 sympathetic with the problem that you've
22 identified, I'm just wondering, is this the case
23 that presents the due process problem that we
24 should be worried about?

25 MR. DVORETZKY: So, for one thing, I

1 think this is the case and the Court granted
2 cert on this question.

3 JUSTICE GORSUCH: Oh, I know we
4 granted cert. It's all our fault. I -- I hear
5 you.

6 (Laughter.)

7 MR. DVORETZKY: Not blaming you. I
8 appreciate it.

9 (Laughter.)

10 JUSTICE GORSUCH: Both can be true.

11 MR. DVORETZKY: But -- but I think --
12 I think this is the case in which to decide how
13 to think about that question, whether the
14 underlying facts involve the facts here in
15 Alabama or the facts in Wayne County in the
16 Ingram case or the hypothetical that you gave.
17 The -- the methodological question about how we
18 think about whether a hearing is required,
19 whether or not a hearing is ultimately required
20 on particular facts, is the same.

21 JUSTICE GORSUCH: But even --

22 MR. DVORETZKY: But --

23 JUSTICE GORSUCH: -- even if one were,
24 couldn't you have gotten one by filing for a
25 summary judgment motion with your innocent owner

1 defense on day one? And if that's true, then
2 what are we doing here?

3 MR. DVORETZKY: I don't know that we
4 could have. There is no guarantee that if that
5 summary judgment motion had been filed on day
6 one that it would have been considered on an
7 expedited basis. There's no -- there's no
8 evidence that the court would have --

9 JUSTICE GORSUCH: Either way?

10 MR. DVORETZKY: -- moved that quickly.

11 JUSTICE GORSUCH: But there's no
12 evidence either way, is there, on that?

13 MR. DVORETZKY: And -- and I think
14 that under Mathews, that goes to the question of
15 what would have been the value of additional
16 process. If, on remand, the state could show
17 under Mathews that, in fact, additional process
18 would have done no good because a summary
19 judgment motion is routinely granted in a matter
20 of days in Alabama, then perhaps, under this
21 scheme, there would not be a need for --

22 JUSTICE GORSUCH: Okay.

23 MR. DVORETZKY: -- for -- for an
24 additional hearing.

25 JUSTICE GORSUCH: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 I'd like to give you an opportunity to
4 respond to the arguments raised I think
5 primarily in the brief for the Solicitor General
6 that requiring retention hearings at the early
7 period that -- that you would will prejudice
8 procedures under the civil forfeiture regime.

9 MR. DVORETZKY: So, Mr. Chief Justice,
10 I think that the civil forfeiture -- the federal
11 civil forfeiture regime presents different
12 issues than the Alabama scheme. And in some
13 ways, the federal forfeiture regime is actually
14 quite protective of -- of vehicle owners.

15 And the principal example that I would
16 give of that is that the federal scheme has --
17 under the federal scheme, a claimant is entitled
18 to immediate release of the seized property if
19 they can show substantial hardship. That
20 substantial hardship inquiry is essentially
21 tracking the Mathews factors. It's asking in a
22 particular case what --

23 CHIEF JUSTICE ROBERTS: Yeah, but the
24 -- the Solicitor General elaborates that there
25 are all sorts of procedures necessary to support

1 forfeiture that will be compromised by a
2 somewhat repetitive hearing or not -- whatever
3 the precursor to make the other one repetitive
4 is -- that will require either ignoring those
5 interests or compromising them, including such
6 basic things as preservation of the property
7 itself.

8 MR. DVORETZKY: So I think those
9 interests are ones that can be addressed in
10 connection with the sort of retention hearing
11 that a Mathews analysis might lead to.

12 If the government is concerned about
13 preservation of the property, that is something
14 that a judge can deal with either potentially by
15 requiring a bond in a particular case, by
16 entering an order prohibiting the disposition of
17 the -- of the property. If the government
18 believes that the property is actually evidence
19 relevant to the underlying crime, that's
20 something that can be addressed in an ex parte
21 hearing with the court, and the court can either
22 allow the government to retain the property or
23 can otherwise take measures in order to preserve
24 it.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 MR. DVORETZKY: And so --

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas, anything further?

5 JUSTICE THOMAS: The -- in Neumann,
6 there was a petition for remission. How similar
7 is your retention to that?

8 MR. DVORETZKY: It -- it is
9 fundamentally different because the petition for
10 remission is essentially -- it's like a request
11 for a pardon. The petition for remission, the
12 premise of that is that the government has the
13 right to keep the -- the property, but the
14 claimant is -- is asking for -- for mercy, for
15 forgiveness, essentially.

16 At a retention hearing, what would be
17 assessed is, first, as we were discussing
18 earlier, what is the government's probable --
19 what is the probable validity of the
20 government's right to retain the car, and then,
21 second, apart from that, and -- and along the
22 lines of what I was discussing with the Chief
23 Justice, what -- what might be the government's
24 interest in retaining the property anyway?

25 Or what might be the government's

1 interest in otherwise ensuring that the
2 property, even if the -- the owner gets it back,
3 is still available at the end of the forfeiture
4 proceeding should it be needed?

5 JUSTICE THOMAS: Well, I understand
6 that, but it seems as though the -- a
7 proceeding, short of the forfeiture proceedings
8 determination in Neumann, the Court said it was
9 unnecessary to sustain constitutional stature of
10 the forfeiture. It wasn't -- you did not need
11 that intervening process of remission.

12 I don't -- and I don't see how that's
13 different from your intervening retention
14 proceeding.

15 MR. DVORETZKY: Justice Thomas, I
16 think it's because, in Von Neumann, you had the
17 remission proceeding, but the remission
18 proceeding was entirely discretionary, whereas,
19 here, Alabama has created this innocent owner
20 defense, which is not discretionary, it's a
21 substantive right that owners have to retain
22 their cars if they are innocent, and it's that
23 innocent owner defense that gives rise to
24 additional due process protections needed to
25 realize the right that the state has created.

1 JUSTICE THOMAS: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: Well, you just said
4 that it's not discretionary. What if it were
5 discretionary?

6 MR. DVORETZKY: If Alabama -- just to
7 clarify, if Alabama had in effect created a
8 discretionary innocent owner right, if you are
9 an innocent owner, then the state may let you
10 keep your car?

11 JUSTICE ALITO: Yes.

12 MR. DVORETZKY: I -- I think that
13 would likely not give rise to due process
14 protections in much the same way that the
15 remission procedure doesn't.

16 JUSTICE ALITO: Could the state create
17 an innocent owner defense but say that it can
18 only be adjudicated at the final forfeiture
19 hearing?

20 MR. DVORETZKY: I -- I'm not sure that
21 it could because I think, at that point, it's
22 created a substantive right to the innocent
23 owner defense, and the procedural protections
24 that arise to protect that are questions at that
25 point of federal law. I don't think that the

1 state could curtail the right that way.

2 JUSTICE ALITO: Well, some of my
3 colleagues may not be interested in this
4 question, but I am interested in this question.
5 You have asked us to say that the Constitution
6 requires this thing called a retention hearing,
7 so I would just like to know what is this thing
8 that you are asking us to recognize?

9 So how soon? What happens at it? Why
10 is it -- how is it practicable for the police?
11 And why is it necessary for the owner?

12 MR. DVORETZKY: Sure. So, first,
13 we're not actually asking you to recognize that.
14 We're asking you to decide the methodological
15 question, and there may be ways in which --

16 JUSTICE ALITO: Well, let me just
17 interrupt you, because the last argument in your
18 brief says that Alabama violated the
19 Petitioners' rights by failing to provide a
20 retention hearing. Anyway, assume that that is
21 part of the question. Go ahead.

22 MR. DVORETZKY: So, in terms of what a
23 retention hearing looks like, I think the -- the
24 Legal Aid Society brief describes how these
25 hearings have worked for 20 years in New York.

1 In New York, it's a hearing that
2 happens within, again, 10 business days, so a
3 couple of weeks, at the request of the innocent
4 owner. It is a process -- it is a hearing at
5 which there are brief opening and closing
6 arguments, and there can be evidence presented,
7 there can be witnesses.

8 At the end of that, the -- the -- the
9 adjudicator will decide, is there probable
10 validity for retaining the property? And,
11 second, what are the government's interests in
12 retaining the property during the pendency of
13 the forfeiture proceedings?

14 Now, to address the government's
15 concerns about evidence disappearing or evidence
16 potentially being actually evidence in the
17 underlying crime, those ex parte proceedings
18 with the decisionmaker, with the judge, are an
19 available tool in that situation to address the
20 government's interests.

21 So, if the government comes in and
22 says this car might actually be evidence in the
23 underlying drug crime, they'd probably be
24 allowed to keep it in that situation and that's
25 something that could be addressed ex parte. The

1 due process standard is flexible, including to
2 protect the government's interests.

3 JUSTICE ALITO: Well, let -- let's
4 just take what might be sort of a typical case.
5 So a car, similar to the facts in one of these
6 cases, that a car is stopped by the police, they
7 find a large quantity of meth in the car, the
8 person driving the car is not the owner of the
9 car, the person driving the car is the spouse or
10 domestic partner of the owner.

11 And then, within a short period of
12 time, there's this innocent owner defense, and
13 the owner of the car, I suppose, testifies, I
14 had no idea this was going on. And then what do
15 you think the -- the state -- what -- what do
16 you think it is reasonable to require the state
17 to do in that situation?

18 MR. DVORETZKY: At -- at a minimum, I
19 would expect the state to cross-examine the
20 owner of the car. And, by the way, the owner of
21 the car would have provided that testimony under
22 penalty of perjury. If they're later determined
23 not to have been an innocent owner, then
24 providing that testimony could subject them to
25 additional prosecution just for that. So --

1 JUSTICE ALITO: Does -- does that
2 happen in New York City, perjury prosecutions
3 under those circumstances? Do you know of cases
4 like that?

5 MR. DVORETZKY: I -- I don't know of
6 cases like that, but I would also assume that
7 people are not going to perjure themselves at
8 the innocent owner hearing. But, if -- if
9 the -- the owner comes forward and testifies,
10 this is my car and I had no idea about the
11 wrongdoing, the government would have the chance
12 to cross-examine them.

13 The government would have a -- a few
14 weeks in which to have conducted whatever
15 investigation they want to conduct. They would
16 have the opportunity to make a case that way.

17 They would also, if necessary, be able
18 to go to the judge and say: Here's evidence
19 that we can only provide to you ex parte so as
20 not to prejudice any later prosecution that they
21 might bring. They might even be able to say to
22 the judge, again, perhaps ex parte, we're in the
23 middle of an investigation and we need a couple
24 more weeks, and the judge would continue the
25 hearing.

1 There's flexibility built into this.

2 But -- but the point is that due process
3 requires some sort of an initial determination
4 when --

5 JUSTICE ALITO: All right. Thank you.
6 Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: Bad facts make bad
10 law, and I fear we may be headed that way.

11 Justice Gorsuch started with the right
12 question. We know there are abuses of the
13 forfeiture system. We know it because it's been
14 documented throughout the country repeatedly of
15 the incentives that police are given to seize
16 property to keep its value as opposed to issues
17 of probable cause or issues of legitimacy of the
18 seizure, okay?

19 We also know that that incentive has
20 often led to months, if not years, of retention
21 of property that ultimately gets returned to the
22 owner because there was either no probable cause
23 or because of the innocent owner defense.

24 So the question before us is, if we
25 make a determination to take the dicta in Von

1 Neumann and in the 8-8 whatever case, all right,
 2 to say that's the entire process you're ever
 3 due, do we leave open the possibility that there
 4 are states, jurisdictions that are abusing this
 5 process and not leaving us any arms to correct
 6 it? That's what we're doing, isn't it?

7 If we say there's no overriding first
 8 question, is this process, the features of this
 9 process, are they enough, whether it's under
 10 Mathews or Barker, then what we're basically
 11 saying is go at it, states, take as much
 12 property as you want, keep it as long as you
 13 want, let's hold out no hope whatsoever that
 14 there's ever going to be any further process
 15 that's due?

16 That's the bottom line, right?

17 MR. DVORETZKY: I -- I think that's
 18 right, Justice Sotomayor. And I think that the
 19 Court should hold here that Mathews is the way
 20 to analyze the statute.

21 JUSTICE SOTOMAYOR: I know that's --

22 MR. DVORETZKY: But the --

23 JUSTICE SOTOMAYOR: -- what you want,
 24 but the point is that if we take that dicta in a
 25 case where none of the process itself was at

1 issue, it was a separate process that was at
2 issue or timing of that process, none of the
3 features of the process is at issue as binding
4 on us, we're throwing up our hands and say due
5 process does not give people any protection
6 whatsoever under any set of circumstances?

7 MR. DVORETZKY: I -- I think that's
8 right. And I think the Court shouldn't do that
9 here regardless of the facts.

10 I also think on the facts -- and I
11 don't want to wear out my welcome -- but I also
12 think --

13 JUSTICE SOTOMAYOR: You are wearing
14 out your welcome --

15 MR. DVORETZKY: I -- I --

16 JUSTICE SOTOMAYOR: -- because, like
17 Justice -- like Justice Jackson, that's not the
18 question before us, whether the process here was
19 enough or not.

20 MR. DVORETZKY: That -- that's right.
21 I -- I -- I do think that there are -- there are
22 explanations for the timeline that took place in
23 this case, but the Court doesn't need to reach
24 that. All the Court needs to decide here is
25 that Von Neumann and \$8,850, as you say, Justice

1 Sotomayor --

2 JUSTICE SOTOMAYOR: There are --

3 MR. DVORETZKY: -- didn't foreclose
4 any and all potential due process claims that
5 one might bring, and Mathews is the way to think
6 about whether additional process is due in this
7 context.

8 JUSTICE SOTOMAYOR: Now, after
9 Krimstock, there are jurisdictions that have
10 looked at these issues under the Mathews test
11 and not required retention hearings, correct?

12 MR. DVORETZKY: Right. A retention --
13 there are different ways in which states might
14 potentially satisfy due process. It doesn't
15 absolutely have to be a retention hearing.

16 JUSTICE SOTOMAYOR: That's what I'm
17 saying, which is it depends on each state's
18 assessment of the factors that Mathews looks at,
19 correct?

20 MR. DVORETZKY: That's right.

21 JUSTICE SOTOMAYOR: And some have not.
22 Some have required others given the uniqueness
23 of their jurisdictions, correct?

24 MR. DVORETZKY: That's right.

25 JUSTICE SOTOMAYOR: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: Could I just ask you
3 to clarify that? Because I was confused when I
4 read your brief about how exactly you want
5 Mathews v. Eldridge to work, whether you want it
6 to be an -- a determination in each individual
7 case as to whether, under the Mathews
8 v. Eldridge factors, a retention hearing is
9 required or whether Mathews v. Eldridge operates
10 to set up certain categorical rules and, if so,
11 what those categorical rules are. Are they
12 likely to be sort of state-by-state rules? You
13 know, how does Mathews work in this context?

14 MR. DVORETZKY: Justice Kagan, I think
15 it does apply at a more categorical level, and
16 that, in fact, is one of the advantages of
17 Mathews over Barker, is that it can apply at a
18 more categorical level and provide some guidance
19 to the states, whereas Barker is inherently
20 retrospective and looks just at the
21 individualized delay in one particular case.

22 The categorical level at which I think
23 Mathews applies, it would make sense to think of
24 it about car owners in jurisdictions with an
25 innocent owner defense. I think that's --

1 that's the level at which it applies.

2 But it's not a nationwide rule that
3 would require a precise copy of Krimstock
4 hearings in all 50 states. It would allow
5 flexibility for states under Mathews to come up
6 with different ways to potentially satisfy the
7 due process guarantee.

8 Again, the question is, is there a due
9 process -- is there a due process question even
10 to ask? And Mathews tells us that there is.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch?

13 Justice Kavanaugh?

14 JUSTICE KAVANAUGH: Just on that
15 methodological question again, the other side,
16 of course, emphasizes precedent, but they also
17 say that what process is due can't just be a
18 policy question. And they -- they look as well
19 at history and they say that, historically, this
20 kind of interim hearing has not been required by
21 the federal government or the states. There
22 have been lots of different approaches.

23 And they say that even today, Alabama
24 is not an outlier. There are lots of different
25 approaches in the states. The states' amicus

1 brief really highlights this. So they say, if
2 we went your way, we would be
3 constitutionalizing a policy question that for
4 over 200 years has been left with the states and
5 the federal government, handled in different
6 ways.

7 So I just want you to respond to that
8 overarching theme that I think is in the
9 Solicitor General's brief, in Alabama's brief,
10 and the states' amicus brief.

11 MR. DVORETZKY: If I could make two
12 points in response to that, Justice Kavanaugh.

13 One, as we've been discussing, our
14 rule does -- that -- the application of Mathews
15 would allow for some amount of continued
16 flexibility by the states. We're not asking the
17 Court to dictate a national rule that a
18 particular type of hearing is required within a
19 particular -- a particular time period. There
20 will still be room for states to -- to
21 experiment and to customize what they think is
22 an appropriate -- an appropriate time and an
23 appropriate kind of hearing or perhaps even a
24 substitute for a hearing, like a -- a hardship
25 determination that could potentially be made

1 based on a -- on a paper filing. So we're
2 leaving room for flexibility.

3 The second point, with respect to
4 history, I don't think the history provides a
5 clear answer for us here. First, at common law,
6 property could be forfeited regardless of
7 whether the owner was innocent. The innocent
8 owner defense is something that didn't exist at
9 common law. And, again, that gives rise to new
10 procedural protections.

11 Second, as Justice Thomas explained in
12 the -- in his Leonard versus Texas dissent from
13 denial, historical forfeiture laws were quite
14 limited. They were limited to a few specific
15 subject areas, like customs and piracy, where it
16 made some sense to think about in rem
17 proceedings. Civil forfeiture today bears
18 little resemblance to that.

19 As Justice Thomas also pointed out
20 there, there's some question about whether, at
21 common law, forfeiture was civil or criminal and
22 whether it carried the additional protections of
23 criminal process.

24 At the founding, forfeiture
25 proceedings had to move quickly. The IJ brief,

1 Institute for Justice brief, explains that
2 courts had to rule within 14 days of the filing
3 date at common law. And so, again, you didn't
4 have this sort of question of months- or
5 years-long delays.

6 JUSTICE KAVANAUGH: Oh, okay.

7 MR. DVORETZKY: And --

8 JUSTICE KAVANAUGH: Well, keep going
9 then. I don't want you to keep going forever,
10 but --

11 (Laughter.)

12 MR. DVORETZKY: The -- the only -- the
13 only last point I was going to make is that
14 common -- is that forfeiture at common law was
15 also considered against a backdrop that the
16 founders had of distrust to civil forfeiture
17 generally based on what the British were doing
18 before the revolution. And so --

19 JUSTICE KAVANAUGH: Well, the --

20 MR. DVORETZKY: -- the history --

21 JUSTICE KAVANAUGH: -- I mean, I'll
22 end it by just saying the early federal statutes
23 seem somewhat inconsistent with that, but I'll
24 -- I'll leave that.

25 MR. DVORETZKY: Well, I --

1 CHIEF JUSTICE ROBERTS: Thank you.

2 Justice Barrett?

3 JUSTICE BARRETT: I have a similar
4 question to Justice Kavanaugh. So -- and I
5 don't think it'll require a long answer. Do you
6 agree -- so, you know, Judge Thapar, in his
7 concurrence in the Sixth Circuit, said: Well,
8 listen, Mathews doesn't apply, you know, drawing
9 on cases like Hurtado, if there is a defined
10 historical practice on point.

11 Do you agree with that, or do you
12 think Mathews would always apply? I understand
13 you think that the history isn't determinative
14 here. And it seems to me like that's kind of do
15 you go with the Constitutional Accountability
16 Center's amicus brief or the municipal lawyers'
17 brief, account on the history? But, just
18 methodologically, do you agree with Judge
19 Thapar's reading of Mathews and our precedent
20 about history and procedure?

21 MR. DVORETZKY: I think that if there
22 is a precise answer to the question in the
23 history, then the history would probably govern,
24 but I think we're very far from that.

25 JUSTICE BARRETT: Okay.

1 MR. DVORETZKY: Very far from that in
2 this case.

3 JUSTICE BARRETT: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: And is it your
7 position that the application of Mathews would
8 necessarily always mean that some additional
9 procedure would be required in a situation like
10 this?

11 MR. DVORETZKY: No. If the
12 application of Mathews could lead to a
13 conclusion that the state's existing process is
14 sufficient, then no additional process is
15 required.

16 JUSTICE JACKSON: Okay. And, you
17 know, I was surprised a little bit, I think,
18 about your answer to Justice Thomas about Von
19 Neumann and why, if at all, remission is
20 different.

21 I had thought that it was not because
22 it was discretionary. I thought it was because
23 the -- the case seems to make pretty clear that
24 it is an administrative alternative to judicial
25 forfeiture under the statute at issue in that

1 case.

2 And so, given that -- you know, the
3 owner was complaining about it not happening
4 quickly enough. He chose the option of
5 remission rather than forfeiture, and he wanted
6 the remission hearing to happen quickly.

7 And the court, I thought, in the
8 language that has been quoted, was making a much
9 more narrow point, which is just that this
10 remission is not a part of the forfeiture
11 hearing. It's not required by due process. And
12 so, therefore, you don't have a claim that it
13 has to be faster under the Constitution, that,
14 really, forfeiture is where due process lies in
15 terms of your constitutional rights, but, of
16 course, that doesn't tell us what steps are
17 necessary in a forfeiture proceeding.

18 But, to the extent that this language
19 is talking about forfeiture being the only
20 thing, I thought it was relative to the
21 alternative administrative remission process.
22 Am I misreading this?

23 MR. DVORETZKY: No. And I don't think
24 we're disagreeing. I would simply add the point
25 that this alternative administrative process

1 didn't create any substantive rights because it
2 was discretionary whether the government would
3 give you back your property or not.

4 JUSTICE JACKSON: True. But it's also
5 the case, I think from this case, that the court
6 then goes on to talk about how remission is not
7 a part of forfeiture, how those are two
8 different things. And so the language, I
9 thought, was just distinguishing forfeiture from
10 remission as opposed to telling us something
11 about the nature of forfeiture, that it's only
12 the forfeiture hearing and you don't get other
13 steps or whatever, which is the way it's being
14 read, I think, by your counterparts on the other
15 side.

16 MR. DVORETZKY: I -- I agree. I think
17 that's -- that's also a -- a relevant
18 distinction of Von Neumann here.

19 JUSTICE JACKSON: All right. Let me
20 finally just ask you about, again, the timing
21 and whether -- you know, I think there is
22 something to this notion that Barker is about
23 timing, but, again, the question remains, isn't
24 the claimant in this case making a timing kind
25 of argument?

1 And I guess I see that, but can you
2 help me with the following hypo and then maybe
3 I'll also get the reaction on the other side.

4 So, if we have a scenario in which
5 everyone agrees that the average time for a
6 forfeiture proceeding is, say, six months after
7 the seizure, and everybody agrees that that is
8 reasonable for due process purposes, Plaintiff
9 Number 1 doesn't receive her forfeiture hearing
10 until 12 months after the seizure, so her claim
11 is that the government was too slow in giving
12 her the hearing.

13 Meanwhile, Plaintiff Number 2 receives
14 her hearing in six months, but she claims that
15 at some point within those six months there
16 should be an opportunity for the court to
17 consider whether she should have been allowed to
18 keep her car during that interim period.

19 She's not complaining about the time.
20 Six months is fine. She got her hearing within
21 the six months. But what she's saying is, while
22 you figure out during that six months who owns
23 this car, I should keep custody of it during
24 that period, and I think we should have that
25 adjudicated separately from the forfeiture

1 hearing.

2 Are those two different things, or are
3 they both really about timing?

4 MR. DVORETZKY: No, I think those are
5 two different claims. The -- the first one is
6 claiming I didn't have a fast enough final
7 merits determination.

8 The other one is claiming: Look, the
9 final merits determination was fast enough under
10 the circumstances, civil litigation takes time,
11 but I shouldn't be deprived of my property
12 during the pendency of that.

13 And, again, it -- it's like the
14 criminal analogy that I used earlier. You
15 wouldn't say that because you have a speedy
16 trial right and that's going to take a year that
17 you don't also have a Gerstein right to a prompt
18 probable cause determination.

19 And in a situation where,
20 hypothetically, the trial did happen within a
21 matter of days, that might moot the probable
22 cause hearing or probable cause determination,
23 but it wouldn't mean that conceptually you don't
24 have two separate rights.

25 JUSTICE JACKSON: And you could have

1 two separate tests --

2 MR. DVORETZKY: Correct.

3 JUSTICE JACKSON: -- depending upon

4 the claims?

5 MR. DVORETZKY: Correct, with the

6 Barker test --

7 JUSTICE JACKSON: Right.

8 MR. DVORETZKY: Correct.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,

11 counsel.

12 Mr. LaCour.

13 ORAL ARGUMENT OF EDMUND G. LaCOUR, JR.

14 ON BEHALF OF THE RESPONDENTS

15 MR. LaCOUR: Mr. Chief Justice, and

16 may it please the Court:

17 Forfeiture has been a critical tool

18 for deterring crime since before the framing,

19 and both history and precedent show what

20 post-seizure process is due to those whose

21 property has been seized.

22 From the Collection Act of 1789 and

23 Slocum to \$8,850 and Von Neumann, the answer is

24 clear. If the forfeiture proceeding is

25 instituted and concluded promptly, then the

1 forfeiture proceeding without more provides the
2 post-seizure hearing required by due process.

3 Now Petitioners assert that another
4 post-seizure hearing is required, a mini-trial
5 mere days or weeks after seizure, and in their
6 telling, the federal government and the states
7 have been violating fundamental rights for
8 centuries with no one noticing until just a few
9 years ago.

10 But their view cannot be squared with
11 history or precedent, and their own cases show
12 why a timely forfeiture proceeding is the
13 meaningful opportunity to be heard at a
14 meaningful time.

15 Only the timeliest test embodied in
16 *Barker v. Wingo* accounts for the striking
17 diversity among forfeiture cases. Some will be
18 simple and others will involve wide-ranging
19 investigations. Some claimants will vigorously
20 press their rights and others will default.

21 As long as claimants can appear before
22 judges promptly, then judges can strike that
23 proper balance in each fact-bound case.

24 Now I've heard my friend today say
25 essentially don't trust judges to be judges.

1 And so, instead, they invoke Mathews to have
2 federal courts act as legislatures in handing
3 down new Rules of Civil Procedure for all 50
4 states and the federal government.

5 But Barker best accounts for what
6 should be the dispositive fact in these cases.
7 The Petitioners were before state courts within
8 two weeks of seizure, yet they ignored that
9 process for over a year. Petitioners received
10 all the process they were due, and this Court
11 therefore should affirm.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: But you criticize the
14 use of Mathews, but Barker is a speedy trial act
15 case, so that would seem to also be an ill fit
16 for determining whether or not you should have
17 an additional hearing.

18 MR. LaCOUR: I don't think so, Your
19 Honor. In \$8,850, the Court considered multiple
20 ways to measure speed. And the Barker factors
21 are exactly the sorts of factors you imagine any
22 judge would look to whether or not Barker had
23 ever been decided. How long has this taken?
24 Why has it taken so long? Is the claimant
25 pushing her rights? And has there been any

1 prejudice?

2 So I -- I think it makes sense why
3 \$8,850 adopted that test. And I don't think
4 Petitioners have asked for it to be set aside in
5 this case. So it should not be --

6 JUSTICE THOMAS: I think --

7 MR. LaCOUR: -- cast aside.

8 JUSTICE THOMAS: -- it seems that
9 Petitioner is not talking as much about a timing
10 issue as whether or not there should be an
11 additional right vindicated. And Barker seems
12 to focus on timing as opposed to whether the
13 additional right exists at all.

14 MR. LaCOUR: That's right, Your Honor.
15 But I -- I think one advantage of Barker is that
16 it -- it really draws from history. If you look
17 at \$8,850, they looked back to Slocum, that 1817
18 decision from this Court where the Court
19 recognized that while probable cause is enough
20 to justify seizure and retention until trial,
21 the individual's right is best protected by
22 forcing the government into court.

23 And if the case is instituted
24 promptly, then the judge can decide what it
25 takes to move that case along promptly,

1 balancing the government's interests in accuracy
2 and its other interests with the claimant's
3 interest in speedy --

4 JUSTICE JACKSON: But you seem to be
5 -- you seem to be suggesting that there is no
6 other kind of claim that can be made related to
7 forfeiture other than its timing. And I guess
8 I'd have you react to the hypothetical that you
9 heard me provide to your counterpart.

10 MR. LaCOUR: Your Honor, I think it's
11 really the same question. The way Ms. Vasquez
12 in \$8,850 teed up her claim is whether or not
13 she was receiving a hearing at a meaningful
14 time.

15 JUSTICE JACKSON: Not in \$8,850. I'm
16 talking about in this case. \$8,850 were -- I --
17 I agree with you that --

18 MR. LaCOUR: Right.

19 JUSTICE JACKSON: -- \$8,850 and Von
20 Neumann were both about the timing --

21 MR. LaCOUR: Right.

22 JUSTICE JACKSON: -- because the Court
23 says in, you know, almost -- in the first
24 sentence of Von Neumann that this is about the
25 36-month delay.

1 But are you saying that that's the
2 only type of procedural due process violation
3 that can occur with respect to civil forfeiture?

4 MR. LaCOUR: I think that's what the
5 Court held, Your Honor. Again, the -- the
6 interest is the same, having the car and not
7 being temporarily deprived of the vehicle. And
8 that was the --

9 JUSTICE JACKSON: No, not being
10 permanently deprived of the vehicle is different
11 from not being temporarily deprived of the
12 vehicle, isn't it?

13 MR. LaCOUR: Right. But Mr. Von
14 Neumann's complaint was the temporary
15 deprivation --

16 JUSTICE GORSUCH: Well, let --

17 MR. LaCOUR: -- that you should --

18 JUSTICE GORSUCH: -- let's -- let's
19 put it this way. I mean, due process has
20 various components, you'd agree, and one
21 component is how quickly your claim can be
22 heard. Another component would be what
23 procedures your claim is going to be decided
24 pursuant to, right?

25 MR. LaCOUR: Yes, Your Honor.

1 JUSTICE GORSUCH: So there's a
2 substantive aspect to it, wrong word, idea,
3 though, that the procedure has to have some
4 robustness to it, okay?

5 MR. LaCOUR: Yes.

6 JUSTICE GORSUCH: So, for example, if
7 I said, oh, I got a quick hearing, but I had to
8 call between 3 and 5 p.m., I had to speak to
9 Sam, but Sam it turns out is on permanent
10 vacation, okay? But I -- I can get a quick
11 hearing, I can get it the next day, but that's
12 what I have to do to get it.

13 Or I get it in front of a kangaroo
14 court, and -- and -- and the judge turns out to
15 be wholly biased, for example, and I can prove
16 it beyond a shadow of a doubt.

17 Those would all be due process issues
18 besides how quickly I got to court, right?

19 MR. LaCOUR: Yes, Your Honor.

20 JUSTICE GORSUCH: Okay. So I -- I get
21 the -- I get that Barker is all about Speedy
22 Trial Act. It's right there in the title. It's
23 all about timing. And that certainly is an
24 important component of due process.

25 But I think your colleague on the

1 other side suggests I'm arguing more about the
2 kangaroo court stuff too and what's happening
3 around the country, as -- as Justice Sotomayor
4 pointed out -- I'm not accusing Alabama of this,
5 to be very clear.

6 MR. LaCOUR: Thank you, Your Honor.

7 JUSTICE GORSUCH: Okay. But there are
8 arguments to be made that there are attempts to
9 create processes that are deeply unfair and
10 obviously so in order to retain the property for
11 the coffers of the state.

12 And I think Justice Sotomayor's
13 concerned that we are not -- if we go down the
14 Barker road and just focus on timing, we're
15 losing that capacity to address those cases.

16 Am I putting it fairly?

17 JUSTICE SOTOMAYOR: You're putting it
18 fairly.

19 JUSTICE GORSUCH: Long-windedly but
20 fairly, I hope.

21 MR. LaCOUR: A couple points. There's
22 no -- just as in \$8,850, there's no argument
23 that the final hearing they received here was a
24 kangaroo court or was not in any way sufficient.

25 JUSTICE GORSUCH: For sure.

1 MR. LaCOUR: And so --

2 JUSTICE GORSUCH: But could those
3 claims -- you acknowledge there might be claims
4 like that to be had?

5 MR. LaCOUR: There may be, Your Honor.
6 I think Barker answers them. If you're
7 requiring someone to reach Sam between 3 and
8 5:00, that's not a very good reason under Barker
9 II and -- for the delay. And if the delay is
10 extending longer --

11 JUSTICE GORSUCH: No, but let's say it
12 happens really quickly, but it's a kangaroo
13 court, an unfair adjudication. You and I would
14 agree that that was wholly and grossly unfair?

15 MR. LaCOUR: Yes, Your Honor, but I
16 think we're -- we're far removed from -- from
17 that scenario.

18 JUSTICE GORSUCH: Of course, we are --

19 MR. LaCOUR: This is totally
20 different.

21 JUSTICE GORSUCH: -- in your case. Of
22 course, you're going to say that, and I
23 understand that.

24 MR. LaCOUR: Right.

25 JUSTICE GORSUCH: But your argument

1 would seem to strip the courts of tools to deal
2 with those kinds of cases.

3 MR. LaCOUR: I don't think so, Your
4 Honor. Sorry. Keep in mind --

5 JUSTICE GORSUCH: Help -- help -- help
6 me write it so that we don't do that.

7 MR. LaCOUR: Well, because in --

8 JUSTICE GORSUCH: If you acknowledge
9 that's a trap --

10 MR. LaCOUR: Yes. Your Honor --

11 JUSTICE GORSUCH: -- we have to avoid
12 it.

13 MR. LaCOUR: -- because, in \$8,850 and
14 in Von Neumann, the final hearing was going to
15 be by a federal judge. You can trust that they
16 are going to uphold the Constitution, they're
17 going to do justice. We shouldn't craft a test
18 that suggests otherwise.

19 Similarly here, the final hearing is
20 going to be in front of a state circuit court
21 judge. So we're not dealing with a kangaroo
22 court scenario. I think that's -- that's far
23 removed.

24 Now you might have that in the
25 administrative law context, like in the Social

1 Security context, and that's where Mathews might
2 be a useful test if you're writing on a blank
3 slate, but, here, we're dealing with a process
4 as well as the country, two litigants coming
5 into court in front of a judge and adjudicating
6 their case.

7 And -- and that's why Barker is enough
8 in that context, because the judge is going to
9 be best situated to balance that need for speed
10 with the need for accuracy. So, if someone has
11 a relatively simple case and they say, Your
12 Honor, I want to move to expedite, I want a
13 hearing in two weeks, it's going to be incumbent
14 --

15 JUSTICE GORSUCH: So let me see if --

16 MR. LaCOUR: -- upon the government to
17 come back.

18 JUSTICE GORSUCH: -- let me see if
19 you're comfortable with this: So long as the
20 processes that are ultimately given are of the
21 sort that are traditionally used for forfeiture
22 and -- and are -- are reasonably fair and
23 comport with traditional due process principles?
24 Something like that?

25 MR. LaCOUR: Yes, Your Honor. We're

1 -- we're --

2 JUSTICE GORSUCH: Something like that?

3 MR. LaCOUR: -- absolutely fine if
4 that's how it functions in Alabama.

5 JUSTICE KAGAN: But, General, I mean,
6 maybe that's not enough. I mean, I'm
7 sympathetic to your point that the question here
8 is pretty similar to the question that we've
9 been dealing with in the two cases because
10 they're all how long is it going to take until I
11 can get an adjudication so that I can get my car
12 back, and that's what they're all about. That's
13 why people want this retention hearing, because
14 it takes too long, even under Barker, to have
15 the final adjudication. I want it back more
16 quickly. Totally right.

17 But we, in fact, have not decided this
18 precise question. We have a couple of sentences
19 which were written broadly and, if taken
20 literally, would -- would answer the case. But,
21 in fact, the two cases that we had were about
22 different kind of procedures at a different time
23 in the process.

24 And so we could say that even though
25 this -- there are similarities here, this

1 remains open to us to decide whether there ought
2 to be, in addition to the Barker -- the Barker
3 limited final adjudication, this -- this kind of
4 retention hearing that -- that applies to the
5 interim period.

6 And I think Justice Sotomayor raises a
7 very important point, which is that we know a
8 lot more now than we did when \$8,850 and the
9 other case were decided about how civil
10 forfeiture is being used in some states, about
11 the kinds of abuses that it's subject to, about
12 the kind of incentives operating on law
13 enforcement officers that -- that tend toward
14 those abuses.

15 So -- so, if we look around the world
16 and we think there are real problems here and
17 those problems would be solved if you got a
18 really quick probable cause determination, why
19 shouldn't we do that?

20 MR. LaCOUR: Well, Your Honor, I would
21 advise you to stay within the record of the case
22 and controversy that's in front of you right
23 now, where you can see ample process was
24 provided to these claimants. We have -- you
25 mentioned the bond that they could have posted

1 at any time to get the vehicles back.

2 And as you were noting earlier with my
3 friend on the other side, they're essentially
4 just asking to have the final hearing two, three
5 weeks after, and that's going to cause serious
6 problems for the government.

7 You -- you will gain speed, but you
8 will lose accuracy. And the stakes are very
9 high in the civil forfeiture context. The
10 government, of course, has a strong interest in
11 obtaining full forfeiture. We have a strong
12 interest as well in -- in making sure that crime
13 doesn't pay.

14 And so, if you have a less accurate
15 retention hearing -- and that's really the only
16 reason to have one, is to have a mini-trial
17 that's less accurate because it's faster -- then
18 you're going to have more property released to
19 -- to criminals, it's going to potentially be
20 misused again, crime will pay more, and you will
21 have more crime.

22 JUSTICE SOTOMAYOR: I'm sorry. Why?
23 First of all, I doubt very much that criminal
24 defendants from whom cars have been taken are
25 going to seek a retention hearing because

1 whatever they say will be used against them in
2 the criminal case. I don't think New York's
3 experience reflects the use of these retention
4 hearing by criminals or by people from whom the
5 goods have been taken that are tied to criminal
6 activity.

7 These cases are most important for one
8 group of people, innocent owners, because they
9 are people who claim they didn't know about the
10 criminal activity. Many of these cases involve
11 parents with young -- with teenage or
12 close-to-teenage children involved in drug
13 activity. The ones that don't may involve
14 spouses or friends.

15 And I assume, in many of these
16 hearings, to the extent that a person is
17 involved in drug dealing, that the government
18 pretty quickly will find out or not find out if
19 that person has a relationship to a home or
20 other place where drugs are being stored,
21 distributed, et cetera, and the government can
22 do what your opposing counsel said, ex parte
23 hearing saying this is a wife who claims she's
24 an innocent owner, but we have evidence that
25 there's drug dealing going on from the home,

1 it's unlikely she's an innocent owner. If it's
2 someone who's unrelated and no continuing
3 relationship, et cetera.

4 So you're talking about criminals get
5 -- keeping these cars. But, given that the vast
6 majority -- I -- I believe the statistic was
7 very high -- certainly, over 60 percent of
8 innocent owners win, it is not criminals keeping
9 cars. It's innocent owners receiving back their
10 cars months, if not years, later.

11 So where does the Barker factors take
12 those interests into account? They don't.

13 MR. LaCOUR: Your Honor, I think they
14 do. I think my friend almost conceded that they
15 do by saying, if they had moved for summary
16 judgment on day one --

17 JUSTICE SOTOMAYOR: This is not --

18 MR. LaCOUR: -- they probably would
19 have had their car back sooner.

20 JUSTICE SOTOMAYOR: This is not the --
21 the Barker factors have three -- they have all
22 government interests focused on --

23 MR. LaCOUR: I would dispute that,
24 Your Honor. The length of delay clearly takes
25 into account the interests of the private party.

1 Being deprived of your car for 14 days is a less
2 significant deprivation than being deprived for
3 400 days. So there is a way --

4 JUSTICE SOTOMAYOR: No, but you're
5 still building in massive delay. How about
6 three months when it's hardship?

7 MR. LaCOUR: Well, Your Honor, you're
8 -- you're assuming that Barker --

9 JUSTICE SOTOMAYOR: Where -- where
10 does that go -- where does that go into the
11 Barker factors?

12 MR. LaCOUR: Your Honor, there may be
13 circumstances where Barker needs to be applied
14 with more teeth, but I don't think that means
15 it's not up to the task.

16 JUSTICE SOTOMAYOR: Well, but why
17 don't you see the Mathews factors as that more
18 teeth? Mathews is just more explicit of adding
19 in the -- I guess, in this case, the
20 Petitioners' factors. Barker seems to be with
21 timing and seeing who caused the timing, what
22 were the government's interests.

23 The government interest is always
24 going to be great, but where does Barker take
25 into account the hardship of the individual?

1 MR. LaCOUR: Well, I -- I think,
2 again, you -- you get in front of a judge
3 quickly, the judge can do -- he can move the
4 case up faster. And this is the advantage of
5 Barker. My friend suggested that Mathews --

6 JUSTICE SOTOMAYOR: The disadvantage
7 is that that process is very discretionary.

8 MR. LaCOUR: Well, I think one
9 disadvantage is that it asks federal judges to
10 try to project into the future what the next
11 typical thousand forfeiture cases are going to
12 be like. When we're dealing with cars and guns
13 and cash and pirate ships --

14 JUSTICE SOTOMAYOR: Well, I -- I want
15 to --

16 MR. LaCOUR: -- there is no typical
17 case.

18 JUSTICE SOTOMAYOR: I'd like you to
19 point out to me one of these cases involving
20 guns, money, or -- what were the other --
21 putting cars aside. Money, cars, and --

22 MR. LaCOUR: There are a lot of older
23 cases involving pirate ships.

24 JUSTICE SOTOMAYOR: Pirate ships. In
25 which of those cases were those things released

1 immediately after a retention hearing?

2 MR. LaCOUR: I think -- I think that's
3 the point, Your Honor, they haven't been at
4 history.

5 JUSTICE SOTOMAYOR: They haven't been
6 because, as I mentioned, people involved with
7 guns, people involved with money, people
8 involved with other things rarely want to come
9 into court for a retention hearing if they have
10 a criminal proceeding in place. The people who
11 come in are the people who are innocent owners.

12 MR. LaCOUR: Your Honor, I think a
13 claim like that would need to come from my
14 friends and would need to be backed up with --
15 with evidence. And it's not uncommon, as this
16 Court has -- as courts have recognized, that
17 criminals oftentimes do put title of property in
18 someone else's name, and that someone else can
19 come forward. Not every purportedly innocent
20 owner is innocent, and not everyone is even an
21 owner.

22 And this is another problem with
23 rushing this hearing, is that someone could come
24 forward and claim ownership but not actually
25 have proper ownership. And if it's happening

1 too quickly, then the actually innocent owner
2 may be out his property and it's not going to be
3 there at the final forfeiture hearing, which is
4 why the government has always had this authority
5 to seize before a hearing, and the same
6 interests that have long justified seizure
7 before a hearing justify not turning the stuff
8 back over immediately after the seizure but,
9 rather, holding it until you can have a prompt
10 but accurate final hearing.

11 JUSTICE BARRETT: General, can I ask
12 you to respond to Petitioners' argument that the
13 historical analogs are not actually analogous
14 here and that we don't have any settled
15 tradition of having a single forfeiture hearing?

16 MR. LaCOUR: I would expect to have
17 seen a mini-trial or a remission -- or not
18 remission -- a retention hearing somewhere in
19 the history, but we do not have that. And if
20 you contrast that with the liberty interest,
21 Justice Scalia's dissent in County of Riverside
22 highlights how there always was this right at
23 common law to be presented to the magistrate
24 right after the arrest.

25 But there's not similar evidence when

1 it comes to property, and that's because
2 property and liberty are very different. The
3 liberty interest --

4 JUSTICE BARRETT: But Justice Kagan
5 pointed out, I mean, there are new kinds of
6 property that arise and there are new kinds of
7 procedures and that things have shifted and
8 maybe the final hearing itself happened in much
9 closer proximity to the seizure. That was
10 Petitioners' suggestion.

11 So, you know, do we -- what do we do
12 then if we think there is no precise analog?

13 MR. LaCOUR: If it -- if -- I think
14 you're still speaking in the language of speed,
15 which is the language of Barker, which is,
16 again, why we think Barker is the test. It is
17 the historical test. It carries that forward to
18 today, institute promptly, conclude promptly,
19 and then let the judges who are on the ground
20 with the parties in front of them weigh those --
21 weigh those competing interests.

22 And when it comes to this affirmative
23 defense of innocent ownership, I don't think
24 that changes things at all. It's actually very
25 similar to the argument that Mr. Von Neumann

1 made. He said he had an independent interest in
2 this remission petition. And the court did
3 assume for purposes of deciding part 3 that he
4 did. And the court said, we don't see how that
5 separate interest, apart from the cars, is in
6 any way prejudiced by this 36-day wait.

7 And the same thing is true here. This
8 separate interest apart from the cars in raising
9 an affirmative defense is prejudiced not at all
10 by being held or being heard for the first time
11 at the final hearing as opposed to two weeks
12 after seizure or two days after seizure for that
13 matter.

14 And if you look to the criminal
15 context, there are affirmative defenses there
16 that typically don't get heard until the
17 criminal trial. So, clearly, affirmative
18 defenses can be meaningful even if they don't
19 get put before a court until the final hearing.
20 And the same thing is true in the civil context

21 JUSTICE JACKSON: I'm sorry, what is
22 the affirmative -- what -- what is -- your
23 conception of this -- the interest that this
24 Petitioner is raising is the ability to make her
25 affirmative defense early? I don't understand

1 where affirmative defense came from.

2 MR. LaCOUR: They say that this case
3 is somehow different because there's now an
4 innocent owner affirmative defense, but, I mean,
5 that same argument was pressed by Mr. Von
6 Neumann when it came to the remission petition.
7 He said, I have this independent right created
8 by federal law to get a remission petition
9 decision, and the Court said that right received
10 all the process it was due by this 36-day
11 process in deciding.

12 The same thing is true here. Their
13 right to claim innocent ownership was heard and
14 was vindicated at the final hearing. There's no
15 need for it to be heard two days or two weeks
16 after seizure in order for it to comport with
17 fundamental fairness.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas, anything further?

21 Justice Alito?

22 Justice Sotomayor?

23 JUSTICE SOTOMAYOR: Can I go back to
24 this common law issue? Assume -- we do know
25 that English common law provided post-seizure

1 process separate from the final forfeiture
2 hearing.

3 The Fourth -- Restore the Fourth's
4 brief lays out that very robust history. We
5 don't have a similar history in early American
6 courts for all the reasons the opposing counsel
7 raised and Justice Barrett made clear, largely
8 because, except for pirate ships and some
9 isolated other types of seizures, we don't have
10 a robust forfeiture process until the 1970s.

11 So going back to her question, which
12 is, if the common law doesn't have a clearly
13 established process, does that mean no process
14 is ever due, or does it mean that we have to
15 judge it by the circumstances that exist in
16 modern times? I would think it's the latter.

17 MR. LaCOUR: You --

18 JUSTICE SOTOMAYOR: And forfeitures
19 were quicker earlier in our history.
20 Forfeitures were rare. And now we've expanded
21 them to all sorts of property interests. Even
22 those involving innocent owners, it's a new
23 thing. So what do we do with a -- without a
24 clear common law analog?

25 MR. LaCOUR: Your Honor, I think the

1 history is a lot clearer and a lot clearer in
2 our favor than the Restore the Fourth brief
3 would make out. We agree with a lot of the
4 premises that in Slocum and I think there's an
5 early Judge Hand decision saying you need to
6 institute or return.

7 Well, that sounds like Barker to me.
8 Institute promptly, conclude promptly. There is
9 not a history of a mini-trial despite the fact
10 that you do have this history in the liberty
11 context of something like a precursor to the
12 Gerstein hearings. I think that -- that absence
13 of evidence is evidence of absence.

14 And then -- and we do think that how
15 courts were protecting the individual right
16 tells us what is demanded today, but not more is
17 demanded, as Von Neumann concluded.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?
19 Justice Gorsuch?

20 JUSTICE GORSUCH: No, thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh?

23 JUSTICE KAVANAUGH: A couple things.
24 First, you agree that Barker takes account of
25 the claimants' interests, hardship, et cetera,

1 correct?

2 MR. LaCOUR: Yes, Your Honor, if
3 you're in front of a judge quickly.

4 JUSTICE KAVANAUGH: The first -- in
5 the first Barker factor, is that right?

6 MR. LaCOUR: Yes, Your Honor. If you
7 get in front of the judge quickly, he can
8 consider all those factors.

9 JUSTICE KAVANAUGH: Okay. And then,
10 on Barker and Mathews v. Eldridge, the Solicitor
11 General in particular suggests that those really
12 are ultimately the same materially, the same
13 thing in this context, ask the same questions.

14 Do you agree with that or not?

15 MR. LaCOUR: We see a little more
16 daylight between the tests, but we -- we do
17 agree that in -- in these cases, they would cash
18 out the same way. That's what the Southern
19 District of Alabama held in Ms. Culley's case,
20 that under Mathews or under Barker, she loses.

21 JUSTICE KAVANAUGH: And suppose we
22 have no precedent on point and suppose we have
23 no idea what the history says, just a complete
24 blank slate. We're purely -- and suppose we're
25 doing Mathews v. Eldridge, okay? We're purely

1 in Mathews v. -- v. Eldridge land.

2 How do we decide whether the new
3 hearing is -- is necessary or not? We're
4 supposed to weigh the government's interests
5 against the individual interests.

6 MR. LaCOUR: Yes, Your Honor. I mean,
7 I -- I would look -- point you to this Court's
8 opinion in Kaley, for example, where they looked
9 at the significant interests the government has
10 in not having to try their case repeatedly. And
11 it's -- it's bolstered in the forfeiture context
12 because, again, movable property can disappear.
13 It can be hidden. It can be misused again.

14 You don't want to turn the car back
15 over to someone who's just allowed it to be used
16 to traffic methamphetamine because odds are
17 there's at least better than zero odds that it
18 might be misused again or disappear.

19 So we think the government's interests
20 are -- are -- are very strong here. And then
21 it -- it's not clear what additional process is
22 really going to be provided when that retention
23 hearing is going to look a lot like the final
24 hearing except for the fact that it's going to
25 be rushed and, therefore, the risk of error is

1 going to increase.

2 And then that risk of error is not
3 just a problem for the public, it's a problem
4 for the other actually innocent owners if a
5 merely purportedly innocent owner makes off with
6 the property because of the error.

7 JUSTICE KAVANAUGH: Just to finish it
8 out, and you would have us just figure out
9 whether we agree more with the government or the
10 individual on that, which -- which interest
11 outweighs the other, we just have to make a
12 policy call on that?

13 MR. LaCOUR: Yes, I think that's part
14 of the problem with Mathews. And it -- and it's
15 not all that predictable. The Second Circuit
16 and the Seventh Circuit just in the context of
17 cars said you do get the retention hearing. The
18 Fifth Circuit and the Southern District of
19 Alabama in this case said you don't get a
20 retention hearing for cars.

21 So it doesn't really give us a whole
22 lot of guidance. We do think --

23 JUSTICE KAVANAUGH: Thank you.

24 MR. LaCOUR: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 Justice Jackson?

3 JUSTICE JACKSON: Well, Barker has
4 factors too. I mean, is there some evidence
5 that Barker's factors are more predictable or
6 lead to results that are more consistent in some
7 way than Mathews?

8 MR. LaCOUR: No, Your Honor, it's more
9 fact-sensitive. And that's the -- my friend
10 would see that as a drawback. I think that's
11 actually a merit of Barker.

12 JUSTICE JACKSON: More fact-sensitive
13 than the factors in Mathews?

14 MR. LaCOUR: Yes. Petitioners'
15 counsel said just a few moments ago that Mathews
16 allows you to do these categorical projections
17 into what the typical case is going to look like
18 in the future so that trial judges can be told,
19 make sure you have a hearing within 14 days no
20 matter what the facts show you.

21 And we don't think that's very
22 flexible at all. We would prefer a test that
23 allows trial judges to be trial judges and weigh
24 the cases as they come.

25 JUSTICE JACKSON: Okay. So you're

1 saying even though you -- your argument is that
2 both Barker and Mathews come out the same way
3 here, somehow, in application, Mathews has --
4 is -- is deficient vis-à-vis Barker? Barker is
5 the better, easier way to -- what -- what is
6 better about it?

7 MR. LaCOUR: Again, it's -- it's
8 fact-sensitive. No two property cases are
9 going -- movable property cases in the
10 forfeiture context are going to be alike. You
11 have lots of different types of property. Even
12 the same type of property can have different
13 values, different claimants.

14 JUSTICE JACKSON: And I thought that
15 was what Mathews allowed for. But you're saying
16 that's -- in your view, that's what Barker is.

17 MR. LaCOUR: The way Mathews has been
18 applied in the Sixth Circuit and the Second
19 Circuit has been to really alter the Rules of
20 Civil Procedure for every case going forward,
21 whether it's a case where the claimant would
22 have defaulted anyway or whether --

23 JUSTICE JACKSON: I'm not talking
24 about how it's been applied, letting judges be
25 judges. I'm talking about the test itself. Are

1 there -- is there something about the factors in
2 the Barker test that is more -- more
3 determinative, allows us to be more predictable
4 about what's going to happen, other than, I
5 guess, the view that you'll never get any other
6 process? If that's -- if that's the result that
7 you think Barker always points to, then I guess
8 it is more consistent than Mathews, but --

9 MR. LaCOUR: Yes, and I think it's --
10 it's a little more specific in describing the
11 government interests. The government has to
12 explain why there is a delay. And then you're
13 looking at the -- the key factor, which is how
14 long has this taken?

15 JUSTICE JACKSON: All right. So just
16 -- finally, getting back to Justice Gorsuch's
17 point, is it your argument that plaintiffs are
18 not allowed in this context, by that I mean the
19 civil forfeiture context generally, to assert
20 that the forfeiture procedures themselves are
21 deficient? Not making a delay claim. I'm
22 conceding, says the plaintiff, that this was not
23 -- that the forfeiture hearing is going to
24 happen or has happened in a timely fashion. But
25 I would like to complain about the procedures

1 that were given to me in that context.

2 Is it your view that -- that no such
3 claim can be made?

4 MR. LaCOUR: Your Honor, if the claim,
5 for example, was that the judge who's sitting
6 over my case is biased against me --

7 JUSTICE JACKSON: No, not that claim.
8 I -- I don't want to make it kangaroo court
9 because that's hard and it will go back to the
10 question that Justice Gorsuch asked.

11 I want to make it something else about
12 the process that is unfair. You know, these
13 involve, as Justice Sotomayor says, people who
14 are -- say that they're innocent owners, that
15 they own the property, and that they knew
16 nothing about the drugs.

17 So the state has a system -- this is a
18 hypothetical I'm making up on the spot. The
19 state has a system in which the manner of
20 proving that the person, you know, knows about
21 the drugs is very unfair. You know, the state
22 says we presume that if you are -- you know,
23 know this individual, then you're aware of their
24 drug activity. And since this person is your
25 son, you obviously know them. You can't bring

1 in any evidence that shows that you didn't know
2 anything about it. You're not an innocent owner
3 under that test.

4 And what the person, the -- the owner,
5 would like to do is say that you can't have a
6 system -- you can't have a method of proof that
7 is so unfair in terms of my ability to prove
8 that I didn't know what was going on. That's my
9 challenge, not that the hearing took too long.
10 It has nothing to do with speed. I want to make
11 that kind of challenge.

12 My question is, is it your view that
13 no such claims exist? And if they do exist, are
14 we judging the due process by the Barker test or
15 some other test in that situation?

16 MR. LaCOUR: Your Honor, I think this
17 Court's decision in District Attorney's Office
18 v. Osborne would suggest that if you've created
19 a new procedural right then, yes, there's some
20 due process protections that attach, but the
21 state has a tremendous amount of discretion in
22 terms of what processes are going to attach to
23 that new --

24 JUSTICE JACKSON: Understood. So --

25 MR. LaCOUR: -- procedural right.

1 JUSTICE JACKSON: -- if you agree that
2 the person could make such a claim, are you
3 saying the Barker test would apply in that
4 situation to determine the -- the ultimate due
5 process question?

6 MR. LaCOUR: It doesn't sound like
7 that's a timing issue, so probably not, Your
8 Honor, but, again, in -- in this case, the issue
9 is they've had my car too long.

10 JUSTICE JACKSON: Okay.

11 MR. LaCOUR: And that's a timing
12 question.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Ms. Reaves.

17 ORAL ARGUMENT OF NICOLE F. REAVES

18 FOR THE UNITED STATES, AS AMICUS CURIAE,

19 SUPPORTING THE RESPONDENTS

20 MS. REAVES: Mr. Chief Justice, and
21 may it please the Court:

22 I think it may be helpful for me to
23 lay out how the federal government sees this
24 case. In our view, the Court has already found,
25 as indicated in *Shelton* and *Von Neumann*, that the

1 only process a claimant is entitled to after
2 personal property is seized is a timely final
3 forfeiture hearing.

4 If this Court is of the view that it
5 has not yet addressed that issue, it should now.
6 And it should hold that a claimant has no right
7 to an interim post-seizure hearing.

8 History and tradition support that
9 rule. At the time of the founding, there was no
10 right to an early hearing when property was
11 seized. Only a timely forfeiture hearing was
12 required. That approach has prevailed for
13 nearly 250 years.

14 The hearings that Petitioners request
15 would upend that history, be extremely onerous,
16 and would require more process for the pretrial
17 deprivation of property than the pretrial
18 detention of persons.

19 Finally, if the government disagrees
20 with our front-line position, while we think
21 that \$8,850 is the better fit for Petitioners'
22 particular claims, the government is largely
23 ambivalent about whether Eldridge or \$8,850
24 applies to determine whether an interim hearing
25 is required in a given case.

1 But, either, way this Court's decision
2 should emphasize that the public and government
3 interests identified in \$8,850 and Pearson Yacht
4 will often weigh strongly against allowing such
5 a hearing.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Ms. Reaves, there's
8 -- there have been quite a few questions that
9 say maybe something substantively goes wrong in
10 this process. How would you address that,
11 assuming that the forfeiture proceedings are
12 timely?

13 MS. REAVES: So I think if there was
14 some sort of question that an individual wasn't
15 receiving due process in the course of the
16 proceedings, so some sort of procedural
17 irregularity, I think there could be a due
18 process claim for that.

19 It wouldn't necessarily be governed by
20 Eldridge or even \$8,850. It could be governed
21 by just the closest, you know, civil law
22 analogy. Like if there's an inappropriate
23 burden of proof being placed on someone, I think
24 that there might be due process analogies for
25 that.

1 But that wouldn't be solved by
2 requiring an additional layer of proceedings in
3 all cases or in a significant category of cases.
4 That's just a different issue.

5 CHIEF JUSTICE ROBERTS: The assessment
6 whether a civil forfeiture proceeding meets the
7 requirements of due process, timeliness is a
8 significant consideration in that, right?

9 MS. REAVES: Yes, it is.

10 CHIEF JUSTICE ROBERTS: And it is, of
11 course, in retention as well?

12 MS. REAVES: Yes.

13 CHIEF JUSTICE ROBERTS: So -- but
14 there's presumably a gap between when you would
15 have that question asked under retention and
16 when you would have it asked under civil
17 forfeiture. How do we look at the significance
18 of that -- that gap?

19 MS. REAVES: So I think the Court
20 would look at that under \$8,850 because \$8,850
21 allows the Court to take into consideration the
22 burden to a particular claimant in a particular
23 case. I think that comes in under the first
24 factor in \$8,850.

25 And I think, you know, the government

1 interests really aren't any different. You
2 know, this Court has talked about the
3 government's interests in Pearson Yacht in not
4 having a pre-seizure hearing. And I think most
5 of those government interests continue to apply
6 to allow the government to retain the property
7 while the hearing is proceeding, you know, as
8 long as the hearing is proceeding in an
9 appropriate amount of time and the government
10 isn't sitting on its hands and doing nothing
11 while holding someone's property.

12 And I -- and I think the history and
13 tradition really are consistent with that. You
14 know, the best evidence of the history here
15 comes from the Collection Acts, which were
16 passed by founding-era Congresses. There was no
17 requirement there be any sort of interim
18 hearing. The normal rule was that once property
19 was seized, it was held until the final
20 forfeiture hearing.

21 And Petitioners' counsel has suggested
22 that once the forfeiture proceeding was filed,
23 there was a 14-day hearing requirement. That's
24 just not the case. So, first of all, under the
25 Collection Acts, the federal government had up

1 to three years between seizure and initiating
2 the forfeiture action. And then --

3 JUSTICE GORSUCH: Sorry to interrupt.
4 Do we need to decide any of that in this case,
5 given that under your count and the state's, the
6 Petitioner here was -- could have brought a
7 summary judgment motion at any time? And,
8 presumably, most of the facts that she would
9 have wanted to present would have been in her
10 control.

11 MS. REAVES: So I -- I think that's
12 right. You could issue a very narrow decision
13 in this case.

14 JUSTICE GORSUCH: Yeah, how would it
15 -- what would it look like in the government's
16 view if we were to say -- want to avoid ruling
17 on -- on that question and also leave open the
18 possibility, as you alluded to with Justice
19 Thomas, that there may be due process
20 considerations beyond timing that might arise in
21 some of these cases?

22 I mean, there are allegations before
23 us that in some states, because law enforcement
24 uses these -- these forfeitures to fund
25 themselves, that they sometimes require somebody

1 who wants some of their property back to agree
2 to give some of it to the government or engage
3 in other concessions outside of regular process.
4 How -- how do we write a narrow opinion that
5 does no harm here?

6 MS. REAVES: So I think the Court
7 could say that we haven't decided whether
8 there's ever any entitlement to an interim
9 hearing, but assuming that there could be such a
10 requirement in some category of cases, it
11 clearly would not -- Petitioners were not
12 entitled to that sort of hearing in this
13 particular case.

14 Now, there may be some dangers in
15 kicking it down the road. I think there will be
16 other petitions coming up because of the Sixth
17 Circuit's decision and even coming out of
18 Krimstock. But the Court definitely could save
19 this for another day if the Court wanted to.

20 JUSTICE KAVANAUGH: I -- I thought you
21 were going to say that the -- that we could say
22 that there's no due process right to an interim
23 hearing, period, but there could be other due
24 process issues related to other aspects of
25 forfeiture proceedings and you don't need to

1 rule those problems out by saying there's no due
2 process right to an interim hearing.

3 MS. REAVES: That's certainly our
4 preferred rule. I think I was assuming that
5 Justice Gorsuch wanted a much more limited rule
6 that just dealt with the facts of this case.
7 But as I said in my opening, we certainly think
8 that the Court has already indicated that
9 there's no --

10 JUSTICE SOTOMAYOR: So what do you --

11 MS. REAVES: -- due process right to
12 --

13 JUSTICE SOTOMAYOR: -- see Barker
14 being, if it's not an interim hearing?

15 MS. REAVES: So I --

16 JUSTICE SOTOMAYOR: I mean, Barker, a
17 defendant, man comes in -- not a defendant -- a
18 Petitioner comes in, makes a motion and says I'm
19 entitled to a Barker hearing. The government
20 claims its interests but I have hardship. And I
21 want a hearing on the level of my hardship
22 versus their interest and their level of proof?

23 Because your brief seems to argue that
24 the Mathews test is fully consistent would --
25 with and would not require any material changes

1 in the Court's traditional Barker-based
2 analysis.

3 That's your brief at page 19.

4 MS. REAVES: So I think I want to --

5 JUSTICE SOTOMAYOR: So due process
6 does require Barker hearings. That's what we
7 said in *Shinn*, 8850 and basically you just don't want
8 to call it a retention hearing?

9 MS. REAVES: So I think I want to be
10 clear of where we are in the analytical
11 framework here. So we don't think there's ever
12 a right to an interim hearing. We think the
13 only right that there is is a timely final
14 forfeiture hearing.

15 And it's certainly true that someone
16 whose forfeiture proceedings are ongoing can
17 say: Look, this is moving too slowly under
18 Barker, and the court can, you know, set its
19 deadlines accordingly, can dismiss the case if
20 it's already proceeded for too long a period of
21 time.

22 And we've also suggested that in this
23 particular case where the claims really are just
24 about timing, you know, Petitioners haven't
25 alleged there wasn't due process to seize their

1 vehicles, they haven't complained with the time
2 -- final proceeding, they can concede in their
3 reply that sometimes a final forfeiture hearing
4 could happen quickly enough, that when the claim
5 is really about timing, that there's going to be
6 little difference between applying \$8,850 or
7 Barker to that type of claim.

8 JUSTICE JACKSON: But I guess --

9 JUSTICE SOTOMAYOR: You keep saying
10 "timely." I don't know what timely is. I have
11 a brief that set out the fact that on some
12 hearings by the nature of what the courts are
13 doing are taking up to a year or more.

14 I don't consider that timely, if I'm
15 an innocent owner who relies on my car for my --
16 for survival. And there's evidence of claimants
17 who, in fact, had children, who lost their job,
18 et cetera.

19 So how do we take care of those
20 things?

21 MS. REAVES: So I think if you're
22 concerned about that sort of thing, the claimant
23 can raise the concern that the proceedings are
24 already taking too long in their ongoing
25 forfeiture proceedings or if the forfeiture

1 proceedings haven't been filed, they can file a
2 Rule 41(g) motion in the federal system or a
3 Rule 313 motion in the Alabama system.

4 So there are ways to bring the
5 timeliness claim up to a court without requiring
6 a retention hearing in all cases. And I think
7 one important thing to keep in mind, and, you
8 know, Petitioner has focused extensively on the
9 fact that there's an innocent owner defense at
10 play here and that that somehow means that
11 there's an earlier entitlement to a hearing.
12 And Alabama law, the version of law that was in
13 effect for this case, makes it clear that that
14 is an affirmative defense.

15 That's in Wallace versus State, which
16 --

17 JUSTICE SOTOMAYOR: Is --

18 MS. REAVES: -- is cited on page 3 of
19 or brief.

20 JUSTICE SOTOMAYOR: Is that part of
21 its new law?

22 MS. REAVES: Excuse me?

23 JUSTICE SOTOMAYOR: Is it part of the
24 Alabama new law?

25 MS. REAVES: It is not, no but the

1 Alabama new law of course is not at issue in
2 this case. And the version of the innocent
3 owner defense that's at issue here only comes in
4 after the state has made out its prima facie
5 case --

6 JUSTICE SOTOMAYOR: Quite interesting,
7 isn't it, that once the incentive is taken out
8 of police officers taking advantage of the
9 system as it exists, that Alabama puts in a
10 system that is much fairer?

11 That was one of the reasons that
12 Alabama resisted granting cert in this case
13 because the new system does look to guarantee a
14 faster process?

15 MS. REAVES: So I think the new
16 system's processes are different, but I think
17 it's important to keep in mind that I don't even
18 think the new system's process would have given
19 these Petitioners faster process.

20 So the innocent owner defense under
21 Alabama's new law, once an innocent owner seeks
22 -- seeks an innocent owner hearing, the state
23 has up to 60 days to respond to that.

24 And that's almost exactly the amount
25 of time that Petitioners would have had their

1 cars returned to them had they proceeded under
2 Alabama state law as it had existed at the time
3 of this case.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas, anything?

7 Justice Alito?

8 Anything further, Justice Sotomayor?

9 Justice Kagan?

10 Justice Gorsuch?

11 Justice Jackson?

12 JUSTICE JACKSON: Yeah, can I just
13 clarify one thing? You -- you say that you
14 think that the only right is to a timely final
15 forfeiture hearing but I thought what was at
16 issue in this case is the test that is to be
17 used to make that determination. So I
18 appreciate that the government thinks it knows
19 the answer in all of these cases, which is, you
20 don't get a hearing. But I thought this -- that
21 the -- I thought we had tests that we applied in
22 the law to lead us to that conclusion in
23 particular cases, depending upon the claims and
24 the circumstances.

25 And so our question was what test?

1 And am I wrong? It -- it -- it feels to me
2 strangely like the government has picked the
3 answer and is choosing the test that will
4 inevitably lead to the answer that the
5 government wants, as opposed to telling us here
6 is the difference between the Barker test and
7 the Mathews test and which one is better in
8 terms of a -- more consistent with our prior
9 case law, et cetera, et cetera?

10 MS. REAVES: So I think we view the
11 answer to the question presented as being it
12 doesn't matter because the Court has essentially
13 already decided this in Von Neumann, in \$8,850.
14 And I --

15 JUSTICE JACKSON: What's your -- what
16 is -- what is your view of my thought that Von
17 Neumann is really much narrower in the language
18 that you're talking about than your -- than
19 the -- than the way it is being read, that it's
20 been taking -- taken out of context?

21 MS. REAVES: So I think Von Neumann,
22 the latter part of that decision, I -- I read it
23 as having assumed that there was a due process
24 right to a timely remission -- adjudication of
25 the remission petition. And then the Court

1 there found that --

2 JUSTICE JACKSON: You mean in section
3 3?

4 MS. REAVES: Yes.

5 JUSTICE JACKSON: But in section 2, it
6 says there is no such thing so it's just kind of
7 continuing to spin out the analysis but it was
8 pretty clear in 2 that the Court was finding
9 that there was no such thing.

10 MS. REAVES: That -- that's certainly
11 correct. I think the Court had maybe
12 alternative holdings that you could -- you could
13 say but I don't think the Court should just
14 ignore the last section of -- of Von Neumann.

15 But I think even if you were to view
16 this case as being, and this issue as not
17 already being decided, I think if you looked at
18 it under an \$8,850 type analysis or even a
19 Mathews v. Eldridge analysis you'd come to like
20 the bottom line conclusion that the Court came
21 to in Pearson Yacht for the same reasons that
22 there's no entitlement to a pre-forfeiture
23 notice and hearing -- or, pre -- excuse me,
24 procedure notice or hearing.

25 JUSTICE JACKSON: So the government's

1 view is that on the methodology, it doesn't
2 really matter whether we do Barker, or like the
3 answer to the QP is it doesn't matter?

4 MS. REAVES: That's correct.

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Rebuttal, Mr. Dvoretzky?

9 REBUTTAL ARGUMENT OF SHAY DVORETZKY

10 ON BEHALF OF THE PETITIONERS

11 MR. DVORETZKY: Thank you, Mr. Chief
12 Justice.

13 First, Von Neumann and \$8,850 didn't
14 decide the question that is presented here.
15 They didn't decide whether there can be an
16 interest in avoiding temporary deprivation that
17 is different from the time to a final
18 disposition.

19 The Court in this case should not
20 strip the lower courts of the tools they need to
21 analyze whether in a particular case more
22 process is due.

23 We've heard the phrase today "Let
24 judges be judges." The Court -- this Court
25 should let judges be judges and trust the lower

1 courts as well as the states and the federal
2 government to figure out what to do with the
3 guidance that this Court should provide that
4 some meaningful process is due in order to
5 protect an innocent owner pending a final
6 adjudication.

7 And jurisprudentially, Gerstein again
8 is another example here. In Gerstein, the Court
9 recognized that there should be a prompt
10 probable cause determination. It took several
11 years of them -- percolation before the Court in
12 City of Riverside provided more concrete
13 guidance and said: Okay, this is what that
14 needs to look like.

15 So all the Court needs to do here is
16 to recognize that the interests that we're
17 asserting are different than the ones that were
18 asserted in Von Neumann and \$8,850. They should
19 be analyzed under Mathews because Mathews is the
20 test for determining whether additional process
21 is due. And then the lower courts and the
22 states, and if necessary the federal government,
23 can figure out how that works.

24 Now, in terms of some of the
25 flexibility that that might afford, the federal

1 statute, 18 U.S.C. 983(f), it allows the --
2 the -- or it entitles a claimant to the
3 immediate release of seized property if they can
4 show substantial hardship. That is in -- in
5 some ways even more valuable than a hearing.

6 So that may be perfectly
7 constitutionally sufficient. Utah has a similar
8 sort of scheme. And so, again, the Court
9 doesn't need to micromanage exactly how all of
10 this works.

11 With respect to Barker, Barker would
12 be a poor fit for the claim that we're asserting
13 here because Barker is not designed to answer
14 the question of whether more process is due.
15 For starters, under the first prong of Barker,
16 it takes a year before Barker even kicks in.

17 Barker does not account for private
18 interests. It doesn't account, for example, for
19 the difference between taking away somebody's
20 car, which is necessary for their livelihood,
21 and taking away some other piece of property
22 that they might not need in the same way.
23 Mathews does.

24 Barker also provides no flexibility in
25 the remedy. The only remedy that Barker can

1 lead to is in the criminal context, dismissal of
2 the indictment, here, dismissal of the
3 forfeiture proceeding altogether. It doesn't
4 provide any flexibility for considering whether
5 additional process is due.

6 With respect to the facts here, no
7 Court has considered the value of additional
8 process and whether, in fact, the -- the
9 plaintiffs could have moved for prompt summary
10 judgment and, if so, how long that would have
11 taken. What we do know is that in the course of
12 ordinary litigation, the state here, to use
13 Sutton's case as an example, the state took five
14 months month to respond to discovery requests
15 about what the state knew about the innocent
16 owner defense, and ultimately those discovery
17 requests were entirely non-responsive.

18 And so all of this back and forth
19 about what could have happened on summary
20 judgment, that's something that the lower courts
21 can consider in the first instance -- it hasn't
22 been considered before -- in applying Mathews
23 and determining what would be the value of
24 additional process.

25 I'd also point out that the facts of

1 this case show how different this case looks
2 from forfeiture at common law. This is not a
3 case about pirates or owners of ships crossing
4 borders. We're talking here about individuals
5 who lost their cars.

6 In Sutton's case, as a result of
7 losing her car, she missed medical appointments,
8 she wasn't able to keep a job, she wasn't able
9 to pay a cell phone bill and, as a result of
10 paying a cell phone bill -- not being able to
11 pay her cell phone bill, was not in a position
12 to be able to communicate about the forfeiture
13 proceedings.

14 In Ms. Culley's case, she not only
15 begged and pleaded with the police for her car
16 back but also had communications with the DA's
17 office. The DA's office said if you comply with
18 our process, you'll get your car back, but it
19 will take at least six months until there's a
20 hearing.

21 And so we're far removed from the --
22 the narrow sense in which history recognized
23 forfeiture.

24 Lastly, Alabama talks about government
25 interests here. Government interests can be

1 weighed, in fact, must be weighed as part of the
2 Mathews analysis. They can also be considered
3 at any retention hearing that might result from
4 Mathews. Approximately 20 states have hearings
5 of some sort like that. Alabama itself now
6 provides a much prompter hearing than it did
7 when -- when my clients' cars were taken.

8 Lastly, I would just end with a quote
9 from this Court's decision in Fuentes. This is
10 at 407 U.S. 90. "A prior hearing always imposes
11 some costs in time, effort, and expense, and it
12 is often more efficient to dispense with the
13 opportunity. But these rather ordinary costs
14 cannot outweigh the constitutional right."

15 We ask that the Court adopt Mathews
16 and remand for the lower courts to consider.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 The case is submitted.

20 (Whereupon, at 11:45 a.m., the case
21 was submitted.)

22

23

24

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